109-110

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1002.~~ 671

RELIEF JACKSON, PLAINTIFF IN ERROR,

vs.

JOHN D. ROBY AND JAMES D. RANKIN.

FILED OCTOBER 9, 1882.

No. ~~1192.~~ 815

JOHN D. ROBY AND JAMES D. RANKIN, PLAINTIFFS IN ERROR,

vs.

RELIEF JACKSON.

FILED JANUARY 8, 1883.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1002.

RELIEF JACKSON, PLAINTIFF IN ERROR,

vs.

JOHN D. ROBY AND JAMES D. RANKIN.

No. 1192.

JOHN D. ROBY AND JAMES D. RANKIN, PLAINTIFFS IN ERROR,

vs.

RELIEF JACKSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 5th day of March, A. D. 1881, came Relief Jackson, by A. W. Brazee, his attorney, and filed in said court his complaint, and sued out of said court a writ of summons against John D. Roby and James D. Rankin. And the said complaint is in words and figures as follows, to wit:

Complaint.

United States circuit court in and for the district of Colorado, ss.

RELIEF JACKSON, PLAINTIFF,
vs.
JOHN D. ROBY AND JAMES D. RANKIN, DEFENDANTS. } Complaint.

Relief Jackson, the said plaintiff, complaining of *of* John D. Roby and James D. Rankin, the said defendants, for a cause of action against
2 them alleges that he, the said plaintiff, is, and at all times hereinafter mentioned was, a citizen of the United States, and a citizen of the State of Indiana, and an actual and bona fide resident of said State of Indiana, having his home and domicil therein; that the said defendants are, and each of them is, and during all of said times were each residents of the State of Colorado, and actual and bona fide residents of said State of Colorado, having their respective homes and domicils therein.

That on the 9th day of August, 1876, he was, and ever since hitherto hath been, and is the owner and entitled to the possession of the "Thomas Klak claim, on Blue River," situate, lying, and being on Blue River, in Spaulding mining district, in the county of Summit and State of Colorado, more particularly described as follows: Commencing at the center of the bridge across Blue River at Breckenridge, and running up said Blue
3 River one thousand (1,000) feet to a stake near fall of the dam at Breckenridge, on which was or had been inscribed "Pre-emption by Thomas Klak and others, March 30th, 1869"; and in width from hill to hill on each side from the centre of said Blue River; and on the said 9th day of August and ever since, hitherto, he hath been in the actual possession of the said above-described premises by his servants and parties acting under agreements with him, as, and the same being, placer-mining ground bearing gold, on the public domain of the United States, and actually worked the same, and caused the same to be worked during the time aforesaid as a placer-mining claim, and actually worked the same and caused the same to be worked in connection with his other placer-mining claims adjacent and contiguous thereto, to wit: Cucumber, Lomax, and Saw-mill Gulch claims, in full compliance with the local laws, rules, and customs of said mining district, and the laws of said State of Colorado and of the United States in such case made and provided; and that he has the possessory right to the said Thomas Klak claim, on Blue River,
4 in virtue of a compliance by himself and his privys in interest and title, and his grantors, with the mining rules, regulations, and customs

of the said mining district, the laws of said State, and with the mining laws of Congress.

And this plaintiff further alleges that some time in the year A. D. 1880, but at what particular time this plaintiff is not informed and cannot more particularly aver, the said defendant entered upon a part of his said Thomas Klak claim on Blue River, to wit, all that portion of said claim which is included within the following metes and bounds, that is to say: Commencing at a post near the east end and opposite the center of said bridge, where the main public road crosses the Blue River at the town of Breckenridge; thence south 27° 5′ west 215 feet; thence south 56° 40′ west 350 feet; thence south 23′ west 288 feet; thence north 79° 19′ east 131 feet; thence south 4° 12′ east 358 feet; thence east 830 feet; thence north 100 feet; thence east 251 $\frac{83}{100}$ feet; thence north 10 west 252 $\frac{76}{100}$ feet; thence 89° 45′ west 384 $\frac{50}{100}$ feet; thence north 70° east 652 $\frac{73}{100}$ feet; thence west 495 $\frac{83}{100}$ feet to the place of beginning, containing eighteen and five hundred and eighty-five one-thousandths acres, be the same more or less, as the same is shown on plat marked "Exhibit B," filed in the land office of the United States at Leadville, in said State of Colorado, with the adverse claim of said plaintiff against the application of said defendants for patent for 23 $\frac{48}{100}$ acres on the so-called Bartlett & Shock placer-mining claim, said application being mining application No. 908; that defendants have ever since their said entry on said parcel of said Thomas Klak claim on Blue River, being said eighteen and five hundred and eighty-five thousandths acres thereof, wrongfully withheld and now wrongfully withhold the possession of said parcel from the plaintiff, to his damage in the sum of one hundred dollars.

And this plaintiff further avers that the said parcel of eighteen and five hundred and eighty-five thousandths acres, being the subject-matter in dispute between this plaintiff and said defendants, exceed in value the sum of five hundred dollars, exclusive of costs, and is of the value of fifty thousand dollars.

And this plaintiff further shows that this action is brought in support of said adverse claim, and that said plaintiff hath necessarily disbursed and incurred, expended or paid out the sum twenty dollars and eighty-five cents for surveys, plats, & abstracts of title filed in said land office with and being part of his said adverse claim, and also a reasonable counsel fee, to wit, fifty dollars, for the expense of preparing his said adverse claim.

Wherefore plaintiff prays judgment against the defendants for the recovery of the possession of the said eighteen and five hundred and eighty-five one-thousandths (18 $\frac{585}{1000}$) acres part and parcel of his said Thomas Klak claim on Blue River, also for said sum of one hundred dollars damages for the detention of the premises and the sum of seventy dollars and eighty-five cents expended and incurred as aforesaid, amounting to one hundred and seventy dollars and eighty-five cents, together the costs of this action.

A. W. BRAZEE,
Plaintiff's Attorney.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Andrew W. Brazee, of the city of Denver, in said district, being duly

sworn, deposes and says that he is the attorney for the plaintiff in the foregoing complaint signed by him, mentioned; that he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true;
8 that the plaintiff in said complaint mentioned, is absent from said district, which is the reason said complaint is not verified by said plaintiff; and further deponent saith not.

(S'g'd) A. W. BRAZEE.

Subscribed & sworn to before me this 5th day of March, A. D. 1881.

{ U. S. DIST. COURT SEAL. } (S'g'd) EDWARD F. BISHOP,
Clerk Dist. C't, U. S.

(Endorsed:) 663. United States circuit court, district of Colorado. Relief Jackson vs. John D. Roby & James D. Rankin. Complaint. A. M. Brazee, pl't'ffs att'y, Denver, Col. Filed Nov. 5, 1881. (S'g'd) Edward F. Bishop, clerk. A. W. Brazee, att'y for pl'ff.

And the said summons is in words and figures as follows, to wit:

Summons.

9 In the circuit court of the United States for the district of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

RELIEF JACKSON, plaintiff, *versus* JOHN D. ROBY AND JAMES D. RANKIN, DEFENDANT'.	Complaint filed in the clerk's office this 5th day of March, A. D. 1881.

The President of the United States of America to John D. Roby and James D. Rankin, greeting:

You, and each of you are hereby notified that an action has been brought in said court by Relief Jackson, plaintiff, against you as defendants to recover the possession of certain specific real property situate in the county of Summit and State of Colorado, to wit, parcel of the Thomas Klak claim on Blue River situate' in Spaulding mining district, as more particularly set forth and described in the complaint filed herein and to which reference is here made, for the sum of one hundred dollars damages for the detention of said premises, and for the further sum of seventy dollars and eighty-five cents, expended in support of his adverse claim, together with the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States and the seal of the said circuit court, at the city of Denver, in said district, this 5th day of March, A. D. 1881, and of the Independence of the United States the 105th year.

{U. S. CIRCUIT COURT SEAL.} (S'g'd) EDWARD F. BISHOP, *Clerk.*
By F. W. TUPPER, *Deputy Clerk.*

10 *Proof of service.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

BRECKENRIDGE, COL., *M'ch* 12, A. D. 1881.

I hereby certify that I received the within writ on the 12' day of March, A. D. 1881, and that I have personally served the same upon John D. Roby and James D. Rankin, the said defendants, by delivering to each of them personally a true copy of the within writ, at the day and time as follows, at Breckenridge, county of Summit, on the 12' day of March, A. D. 1881.

This writ therefore returned served, as the law directs, this 14' day of March, A. D. 1881.

Marshal.
By R. L. NUTE, *Deputy Marshal.*

Marshal's fees.—Service, 2 def'ts at $2.00 ea., $4.00; mileage, 2 m's at 6c., going only, $ .12; postage, $ .18. Total, $4.30; paid by A. W. Brazee, esq'r.

(Indorsed:) Gen. No. 663. Circuit court of the United States, for the district of Colorado. Relief Jackson, plaintiff, versus John D. Roby and James D. Rankin, defendants. Summons. Filed this 14' day of March, A. D. 1881. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. A. W. Brazee, of Denver, attorney for plaintiff.

11 And afterwards, and on, to wit, the 18th day of April, A. D. 1881, came the said defendants, by Messrs. A. D. Bullis and M. B. Carpenter, their attorneys, and filed in said court and in said cause his answer to the complaint. And the said answer is in words as follows, to wit:

Answer.

United States circuit court in and for the district of Colorado, ss:

RELIEF JACKSON, PLAINTIFF,
vs.
JOHN D. ROBY AND JAMES D. RANKIN, DEFENDANTS. } Answer.

The defendants answer to the complaint, and deny that the plaintiff on the 9th day of August, A. D. 1876, or at any time prior or subsequent thereto, was the owner of the premises alleged and described in said complaint.

Deny that the said plaintiff on said date, or at any other time, or at all, was in possession of said premises, actual or constructive, and
12 deny that said plaintiff has the right to occupy and possess said premises, or any part thereof, by virtue of actual possession, occupation, or in any manner whatever.

Deny that defendants entered upon said premises and ousted or dispossessed the plaintiff therefrom on said date or time, or at any other time, and deny that said plaintiff has been damaged by said defendants withholding said premises, or the possession thereof, in the sum of one hundred dollars, or in any sum whatever.

As to what amount, if any, plaintiff has expended in support of adverse claims and counsel fees, defendants have not, and cannot obtain sufficient knowledge or information upon which to base a belief.

The defendants, further answering, say that they are citizens of the United States and that the property in said complaint described as the "Thomas Klak claim on Blue River," is the property of, and in the possession and occupation of, defendants.

13 That defendants own, hold, occupy, and possess the same by right of prior occupation, location, and purchase from the original locator thereof, under and by virtue of and in compliance with the local rules and customs of miners in Spalding & Miners' mining districts, the laws of the United States and of the State of Colorado.

Wherefore defendants ask to be dismissed and to recover their costs of this suit.

(S'g'd) A. D. BULLIS AND
M. B. CARPENTER,
Attorneys for Defendants, Denver, Colo.

STATE OF COLORADO, *Summit County, ss:*

James D. Rankin, of the town of Breckenridge, said county and State, being duly sworn, deposes and says that he is one of the defendants in the foregoing answer; that he has had read to him and knows the contents thereof, and that the same is true of his own knowledge, and that this verification is made in his own behalf and in behalf of his codefendant herein.

14 (S'g'd) JAMES D. RANKIN.

Sworn and subscribed before me this 16th day of April, A. D. 1881.

[NOTARIAL SEAL.] (S'g'd) SYDNEY MYERS.
Notary Public.

(Endorsed:) 663. United States circuit court, district of Colorado. Relief Jackson vs. John D. Roby & James D. Rankin. Answer. Filed Apr. 18, 1881. (S'g'd) Edward F. Bishop, clerk. A. D. Bullis and M. B. Carpenter, att'ys for defendants, Denver, Colo.

And afterwards, and on, to wit, the 28th day of April, A. D. 1881, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his replication to the answer heretofore filed herein. And the said replication is in words and figures as follows, to wit:

Replication.

United States circuit court within and for the district of Colorado, ss:

15 RELIEF JACKSON, PLAINTIFF,
vs.
JOHN D. ROBY AND JAMES D. RANKIN, DEFENDANTS. } Reply.

Relief Jackson, the said plaintiff, for a reply to the answer herein, denies that the said "Thomas Klak claim on Blue River" is the property of the defendants, and denies that the defendants own, hold, occupy, and possess the same by right of prior occupation, location, relocation, and purchase from the original locators thereof, under and by virtue of and in compliance with the local rules and customs of miners in Spaulding mining district, of the laws of the United States, and of the State of Colorado, and denies that they have any right or title to the same, or to occupy or possess the same under any rules, customs, or laws, or otherwise.

A. W. BRAZEE,
Plaintiff's Attorney.

UNITED STATES OF AMERICA,
District of Colorado, ss:

16 Andrew W. Brazee, of the city of Denver, in said district, being duly sworn according to law, deposes and says that he is the attorney for the plaintiff in the foregoing reply mentioned; that he has read said reply and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; that said plaintiff is absent from said district, which is the reason said reply is not verified by said plaintiff; and further deponent saith not.

(S'g'd) A. W. BRAZEE.

Subscribed and sworn to before me this 28th day of April, A. D. 1881.

{ U. S. DISTRICT COURT SEAL. } (S'g'd) EDWARD F. BISHOP, *Clerk.*
By F. W. TUPPER, *Deputy Clerk.*

(Endorsed:) No. 663. Circuit court. Relief Jackson vs. John D. Roby et al. Reply. A. W. Brazee, pl'ff's att'y. Filed Ap'r 28, 1881. (S'g'd) Edward F. Bishop, clerk.

17 And afterwards and on, to wit, the 1st day of June, A. D. 1881, the same being one of the regular juridical days of the May term A. D. 1881, of said court—present the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Jury come; trial continued.

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession of specific real property, &c.

At this comes the said plaintiff, by A. W. Brazee, esq'r, his attorney, and the said defendants, by M. B. Carpenter, their attorney, also come:

And thereupon comes a jury, to wit: 1, M. C. Kirby; 2, John Mellor; 3, Charles T. Allen; 4, William Fullerton; 5, Lewis C. Ellsworth; 6, F. W. Gromm; 7, Zeph E. Hart; 8, J. Warren Faxon; 9, Dennis W. Wilby; 10, Thomas Reese; 11, Joseph A. Blake; 12, Alex'r B. Eliel, good and lawful men, and they are duly selected and tried, im-
18 paneled, and sworn to well and truly try the issues herein joined, and a true verdict give according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment, when the further hearing herein is postponed until to-morrow, Thursday, the 2d instant, at the hour of 9 o'clock a. m.

And the said jurors, being each duly cautioned by the court not to converse among themselves nor with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication touching the same, are permitted to separate to meet the court as aforesaid.

And afterwards and on, to wit, the 2d day of June, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial continued.—Verdict.

19 RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession of specfic real property, &c.

At this day came again the said parties by their attorneys respectively, and the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors having heard the evidence produced herein, and the instructions of the court, upon their oaths do say they find that neither the said plaintiff or the said defendants have proven, at this trial, their title to the premises in the said complaint described, and they assess the said plaintiff's damages herein at seventy dollars and eighty-five cents ($70.85).

And afterwards, and on, to wit, the 7th day of June, A. D. 1881, the same being one of the regular juridicial days of the May term, A. D. 1881, of said court:

Present, the honorable Moses Hallett, district judge, the follwing proceeding was had and entered of record in said court, and in said cause, to wit:

20 *Order: Enter judgment.*

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES R. RANKIN. } For possession of specific real property, &c.

At this day comes the said plaintiff, by A. W. Brazee, esq., his attorney,

and the said defendants, by M. B. Carpenter, esq., their attorney, also come:

And thereupon the said plaintiff moves the court for judgment herein. Wherefore let judgment be entered upon the verdict of the jury herein, that the title to the premises in controversy remain as heretofore, and in favor of the said plaintiff, and against the said defendant, for seventy dollars and eighty-five cents ($70.85).

And thereupon, and on the same day, to wit, the 7th day of June, A. D. 1881, judgment was duly entered against the said defendant in the judgment book of said court, in pursuance of the statutes and rules of court. And the said judgment is in words and figures as follows, to wit:

21 *Judgment.*

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession of specific real property and for damages.

On this 7th day of June, A. D. 1881, the same being one of the regular juridicial days of the May term, A. D. 1881, of said court, there being present the honorable Moses Hallett, district judge:

It is considered by the court that the title to the premises in controversy as described in the said plaintiff's complaint, to wit, that portion of the Thomas Klak claim on Blue River, which is included within the following metes and bounds, that is to say: Commencing at a post near the east end and opposite the center of said bridge, where the main public road cross' the Blue River at the town of Breckenridge, thence south 27° 5′ west 115 feet; thence south, 56° 40′ west 350 feet; thence south 23 west 288 feet; thence north, 79° 19′ east 131 feet; thence south 4° 12′ east 358 feet;
thence east 830 feet; thence north 100 feet; thence east, $25\frac{83}{100}$ feet;
22 thence north 10° west, $252\frac{76}{100}$ feet; thence north 70° east $652\frac{73}{100}$ feet; thence west $495\frac{83}{100}$ feet to the place of beginning; containing eighteen and $\frac{585}{1000}$ acres, more or less, in Summit County and State of Colorado, remain as heretofore, and that the said plaintiff do have and recover of and from the said defendants seventy dollars and eighty-five cents ($70.85) his damages, and that he have execution therefor.

And thereupon, and on the same day, to wit, the 7th day of June, A. D. 1881, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Judgment vacated; new trial granted.

RELIEF JACKSON
vs.
JOHN D. ROBY ET AL. } For possession of specific real property, &c.

At this day comes the said plaintiff, by A. W. Brazee, esq'r., his attorney, and the said defendants by M. B. Carpenter, esq., their attorney, also come

And thereupon the said plaintiff moves the court to vacate the

23 judgment lately had herein, and for a new trial of the issues herein.

And it appearing to the court that the parties hereto have each paid their own costs herein:

Therefore it is ordered that the judgment lately and on this day had herein be vacated and for naught held, and that a new trial of the issues herein joined be had in pursuance of the statute in such case made and provided.

And afterwards and on, to wit, the 4th day of October, A. D. 1881, the same being one of the regular juridical days of the October term, A. D. 1881, of said court:

Present, the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Judgment vacated; new trial granted.

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession of specific real property and for damages.

24 At this day comes the said plaintiff, by A. W. Brazee, esq., his attorney, and moves the court to vacate the judgment herein, and for a new trial of this cause herein.

And it appearing to the court that the taxed costs have been fully paid and discharged by the said plaintiff; therefore it is ordered that the judgment lately and on the 7th day of June, A. D. 1881, had herein be vacated and for naught held, and that a new trial of the issues herein be had in pursuance of the statutes in such case made and provided.

And afterwards, and on, to wit, the 12th day of October, A. D. 1881, the same being one of the regular juridical days of the October term, A. D. 1881, of said court:

Present, the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for leave to file sup'l answer denied.

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession, etc.

25 At this day comes the said plaintiff, by A. W. Brazee, esq., his attorney, and the said defendants, by M. B. Carpenter, esq., their attorney, also come.

And thereupon the said defendants here in open court moves the court for leave to file herein a supplemental answer, and the court being now sufficiently advised in the premises, it is ordered that the said motion be denied.

And afterwards and on, to wit, the 3d day of November, A. D. 1881,

the same being one of the regular juridicial days of the October term, A. D. 1881, of said court, present the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion to continue denied.

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession of specific real property, &c.

26 At this day comes the said plaintiff, by A. W. Brazee, esq., his attorney, and the said defendants, by M. B. Carpenter, esq., their attorney, also come.

And thereupon the said plaintiff moves the court here in open court that this cause be continued; and the court having read the affidavits thereon. and being now sufficiently advised in the premises, it is ordered that the said motion be denied.

And thereupon and on the same day, to wit, the 3d day of November, A. D. 1881, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Jury come; trial continued.

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } 663. For possession of specific real property, &c.

At this day comes the said plaintiff, by A. W. Brazee, esq., his attorney, and the said defendants, by M. B. Carpenter, esq., their attorney,
27 also come.

And thereupon comes a jury, to wit, 1, P. C. Johnson; 2, Rufus Shute; 3, Lucus Brandt; 4, Watterman Batley; 5, William A. Corson; 6, George W. Geldersleeve; 7, Martin V. Suther; 8, E. J. Giddings; 9, C. J. Gird; 10, Joseph L. Bailey; 11, Charles Hallack; 12, James Miller, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined, and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being each duly cautioned not to converse among themselves, or with others, touching this cause, or the matters at issue herein, or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at the next incoming.

And afterwards and on, to wit, the 4th day of November, A. D. 1881, the same being one of the regular juridical days of the October term,
28 A. D. 1881, of said court, present the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial; verdict for defendants.

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession of specific real property, &c.

At this day come again the said parties, by their attorneys, respectively, and the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, upon their oaths do say they find that neither of the parties herein have proven title to the property in the complaint described.

Wherefore it is considered by the court that the said defendants go hence hereof without day, and let each party pay their own costs herein to be taxed.

And afterwards and on, to wit, the 13th day of December, A. D.
29 1881, the same being one of the regular juridical days of the October term, A. D. 1881, of said court, present the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Plaintiff to file bill of exceptions in thirty days.

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession of specific real property and for damages.

At this day comes the said plaintiff, by A. W. Brazee, esq., his attorney, and thereupon, on his motion, day until thirty (30) days from this day is allowed the said plaintiff in which to file herein his bill of exceptions reserved by him upon the trial of the issues herein joined.

And afterwards and on, to wit, the 27th day of December, A. D. 1881, the same being one of the regular juridical days of the October term, A. D. 1881, of said court, present the honorable Moses Hallett,
30 district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Plaintiff and defendants to file bills of exception by January 15th, A. D. 1882.

RELIEF JACKSON
vs.
JOHN D. ROBY AND JAMES D. RANKIN. } For possession of specific real property and for damages.

At this day comes the said plaintiff, by A. W. Brazee, esq., his attorney, and the said defendants, by M. B. Carpenter, esq., their attorney, also come.

And thereupon, for good and sufficient reasons to the court appearing, it is ordered that as well the *the* plaintiff as the said defendants file herein their bills of the exceptions by them respectively reserved upon the trial

of the issues herein joined, on or before the 15th day of January, A. D. 1882.

And afterwards and on, to wit, the 12th day of January, A. D.
31 1882, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of the issues herein and the said bill of exceptions is in words and figures as follows, to wit:

Plaintiff's bill of exceptions.

In the circuit court of the United States in and for the district of Colorado.

RELIEF JACKSON, PLAINTIFF,
vs.
JOHN D. ROBY AND JAMES D. RANKIN, DEFENDANTS.

Be it remembered that *afterwards* [heretofore], to wit, at a circuit court of the United States held at the United States court-rooms, at the city of Denver, in and for the district of Colorado, at the October term thereof, A. D. 1881, to wit, on the third day of November, A. D. 1881, that being one of the regular court days of said term, before the honorable Moses Hallett, district judge of the said district, sitting alone and holding
32 said circuit court, according to the form of the statute in such case made and provided, the aforesaid issues, so joined between the said parties as aforesaid, came on to be tried by a jury of the said district for that purpose duly impaneled, good and lawful men of the said district, at which last mentioned day came then as well the said Relief Jackson as the said John D. Roby and James D. Rankin, by their respective attorneys aforesaid; and upon the trial of said issues the counsel learned in the law for the said Relief Jackson to maintain and prove the said issues on his part offered evidence tending to prove that in the months of March and April, 1869, in Spalding mining district, in Summit County, Colorado, it was the custom of miners to make locations of placer mining claims of the length of two hundred feet up and down the stream and from hill to hill, and to make a record thereof in the office of the county recorder, and that the premises in controversy are situated in said mining district.

And further the said plaintiff gave in evidence the following
33 certificate of location and the record thereof:

(*Book L, page* 127.) *Thomas Klak claim on Blue River.*

TERRITORY OF COLORADO,
County of Summit, ss:

Know all men by these presents that we, the undersigned, claim by right of pre-emption for mining purpose the following described mining property, situate, lying, and being on Blue River, in Spalding mining district, to wit: Commencing at the center of the bridge across Blue River, at Breckenridge, and running up Blue River one thousand (1,000) feet to a stake near the fall of dam at Breckenridge, on which is inscribed

"Pre-emption by Thomas Klak and others, March 30th, 1869, and in width from hill to hill on each side from the center of said Blue River."
Dated March 30th, 1869.

THOMAS KLAK.
JOSEPH HILDEBRAND.
JAMES McCULLOUGH.
CLAUS BERENZ.
PATRICK CASSIDY.

Recorded at 4 o'clock p. m., April 22d, 1869.
WILLIAM P. PALLOCK,
Recorder.

34 STATE OF COLORADO,
County of Summit, ss:

I, John A. Willoughby, county clerk and ex-officio recorder of deeds, etc., in & for the county and State aforesaid, do hereby certify that the foregoing is a full, true, correct, and complete transcript of record of the above instrument as the same appears of record in my office.

Witness my hand and official seal this 4th day of May, A. D. 1881.

SUMMIT COUNTY. L. S. COLORADO.

JOHN A. WILLOUGHBY,
County Clerk & Recorder,
By JOHN McNAMARA, *Deputy.*

Which location included the land in controversy. And, further to maintain the issues on his part, the said plaintiff gave evidence tending to prove that the grantors of the plaintiff being the owners also of certain other claims next to and adjoining the premises in controversy, in a place called Lomax Gulch, began to work the said claim so as aforesaid adjoining the premises in controversy in the year 1872, and they and the plaintiff
35 continued the work on such claim in each mining season until and during the year 1880; that in prosecuting the work on said claim in Lomax Gulch the flume used by the grantors of plaintiff and the plaintiff was extended over and onto the premises in controversy a distance of one hundred and fifty feet, and the tailings from the said Lomax Gulch claim were carried out onto the premises in controversy, so that at the end they extended over one-third part of the entire area of said claim and on the ground claimed by defendants; that it was necessary to use the premises in controversy in manner aforesaid in working the claim in Lomax Gulch. Except in the manner aforesaid, by extension of the flume and using the place as a dumping ground, neither plaintiff nor his grantors were shown to have worked the premises in controversy, or to have been in possession of the same. Plaintiff gave in evidence deeds showing a complete claim to title from the persons making the location cer-
36 tificate before recited to himself, and also showed title to the claim in Lomax Gulch; and that all of said deeds had been recorded in the office of the recorder of Summit County before the entry of the defendants on the land in controversy, and purported to convey the land in controversy.

And the plaintiff further gave evidence tending to prove that the land in controversy was mineral land, containing auriferous sand and gravel affording gold, and was public land of the United States, and tending to

show that the defendants entered upon the lands in controversy before the commencement of this action, and thereupon the said John D. Roby and James D. Rankin, by their counsel learned in the law, gave certain evidence to maintain and prove the said issues on their part.

Whereupon the said counsel for the said Relief Jackson did then and there, on behalf of the said Relief Jackson, insist before the said
37 district judge so holding said circuit court that the said matters so produced and given in evidence on the part of the said Relief Jackson as aforesaid, tending to prove the facts aforesaid, were sufficient to be, and ought to be, admitted to be considered by the jury, and if the said jury should find such evidence proved the several facts aforesaid, which the same tended to prove as aforesaid, the said Relief Jackson would be entitled to a verdict on the said issues between him and the said John D. Roby and James D. Rankin so joined as aforesaid; and the said district judge so holding said court as aforesaid did then and there declare and deliver his opinion that the several matters so produced and given in evidence on the part of the said Relief Jackson as aforesaid, tending to prove the several facts aforesaid, were not sufficient, if believed by the jury, to establish such facts to prove any possession or right of possession in him, said Relief Jackson, to the premises in controversy or to entitle him
38 to a verdict in this cause, whereupon the said counsel for the said Relief Jackson did then and there, on behalf of the said Relief Jackson, except to the aforesaid opinion of the said district judge; and the said district judge did then and there further declare and deliver his opinion that the user of the said Thomas Klak claim, and of the land in controversy under the circumstances as aforesaid stated, did not give said Relief Jackson any possession or right of possession to the ground included in said Thomas Klak claim, nor to any part or parcel thereof; whereupon the said counsel for the said Relief Jackson, on behalf of the said Relief Jackson, did then and duly except to the last aforesaid opinion of the said district judge so holding said court.

And thereupon the said district judge so holding said circuit court did then and there declare and deliver his opinion to the jury aforesaid that the several matters produced and given in evidence on the trial of
39 said issues by the said parties, respectively, were not sufficient to entitle either of them to a verdict in this cause and instructed the jury to so find, whereupon the counsel of the said Relief Jackson, on behalf of the said Relief Jackson, did then and there except to so much of the last mentioned opinion, decision, and instruction as decides that the said plaintiff was not entitled to a verdict, and which directed the jury so to find.

And the said jury then and there gave their verdict that neither of the parties herein have proven title to the premises in the complaint described. And inasmuch as none of the matters and exceptions aforesaid appear in the record herein, the said Relief Jackson has caused this bill of exceptions to be prepared and tendered within the time granted by the said court, and to be signed sealed during said term as of the 4th day of November, A. D. 1881, and prays that the same may be attached to and made a
40 part of the record aforesaid, which is accordingly done.

(Signed) MOSES HALLETT, [SEAL.]
Dist. Judge.

(Endorsed:) No. 663. U. S. circuit court. Relief Jackson vs. John D. Roby & James D. Rankin. Pl'ff's bill of exceptions. A. W. Brazee, pl'ff's att'y. Filed Jan. 12, 1882. (S'g'd) Edward F. Bishop, clerk.

And afterwards, and on, to wit, the said 12th day of January, A. D. 1882, came again the said defendants, by their attorney aforesaid, and filed in said court and in said cause their bill of exceptions, reserved by them upon the trial of the issues herein. And the said bill of exceptions is in words and figures as follows, to wit:

Defendants' bill of exceptions.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the circuit court of the United States within and for said district.
October term, 1881.

41 RELIEF JACKSON, PLAINTIFF,
vs.
JOHN D. ROBY AND JAMES D. RANKIN, DEFENDANTS. } Defendants' bill of exceptions.

Be it remembered that on the trial of the issues herein joined before the honorable Moses Hallett, district judge of said district in said court, presiding, and a jury, the said plaintiff, to maintain the issue on his part, offered in evidence a location certificate purporting to cover the ground in controversy. Whereupon the said defendants objected to the admission of the same for the reason that no usage or custom or rule of miners concerning the size and location of placer claims had been shown, or that the certificate was made according to the local rules of the district, or any law, or that the boundaries had been staked or marked, or a discovery of mineral shown. Which objection was overruled by the court, and the certificate admitted in evidence. To which ruling of the court the said
42 defendants then and there excepted.

The said plaintiff further offered in evidence certain deeds from the alleged locators and others to the plaintiff. Whereupon the said defendants objected to the admission of each and all of the same, for the reasons above given, to the admission of the location certificate, and that no title had been shown in the locators and grantors, and hence none could be conveyed by such deeds. Which objections were overruled by the court, and the deeds were admitted in evidence. To which ruling of the court the said defendants then and excepted.

The said defendants, to maintain the issue on their part, gave evidence tending to prove that the ground located by them, jointly and in controversy, was vacant and unoccupied, and had been so vacant for a long time prior to their location thereof, except that it had been in part occupied by Bartlett & Shock, and their claim thereto purchased by defendants previous to their location.

43 The defendants also gave evidence tending to prove that prior to and at the time of their location of the ground in controversy in July, 1880, it was the custom or usage among miners in that district and locality to locate placer claims in accordance with the law of Congress re-

garding the size thereof; that miners located twenty acres or less to the man; that two persons joined together and located forty acres or less, and that eight persons by joining together could locate one hundred and sixty acres of placer ground.

That prior to 1866, in that district, miners located placers in one-hundred-feet claims. That about 1866 the custom or usage of locating one-hundred-feet claims became obsolete, and the miners, from 1866 to about 1876, located two-hundred-feet claims.

That in 1876, and from thence hitherto, the usage or custom of locating two-hundred-feet claims fell into disuse and was generally disregarded, and that the miners of that district located placers in twenty-acre claims to the man, or forty acres or less to the two men, and so on up to one hundred and sixty acres for eight men.

The defendants further gave evidence tending to prove that on the 13th day of July, 1880, they made a discovery of mineral upon their claim, located the same by posting a notice thereon containing the name of the claim, the name of the locators, the date of discovery, and the number of acres claimed; that they marked the boundaries thereof with substantial posts sunk into the ground, one at each angle of the claim. That thereafter, and within thirty days from the date of discovery of mineral thereon, they recorded in the office of the recorder of the county of Summit a location certificate, which contained the name of the claim, designating it as a placer claim, the names of the locators, the date of location, the number of acres claimed, viz, twenty-three and forty-nine one-hundredths ($23\frac{49}{100}$) acres, and a description of the claim by such reference to natural objects and permanent monuments, as did fully identify the the claim; that they were in the open and peaceable possession of the same at the time of the commencement of this action, and that they were each citizens of the United States at the time of their location. This was all the evidence given by the defendants upon the trial of this action, and thereupon the said defendants prayed the court to give to the jury the following instructions:

1. The jury are instructed that a rule or custom of miners must not only be established or enacted, but must be in force at the time and place of the location. It does not, like a statute, acquire validity by the new enactment, but from customary obedience and acquiescence of the miners. It is void whenever it falls into disuse or is generally disregarded.

2. It is for you to determine whether the one hundred or two hundred feet limitation in Spalding mining district had fallen into disuse, or was really in force at the date of defendants' location. If it was not in force, then in that particular, if otherwise valid, and the ground was open to location or relocation, then the defendants' location was good and valid to the extent of twenty-three $\frac{49}{100}$ acres.

If you believe that the limitation was in force, then it was void as to the excess over one hundred feet or two hundred feet up and down the Blue River, and in width from hill to hill, but valid to that extent, if otherwise good, and no more.

3. The jury are instructed that it is not necessary to sink a discovery hole or shaft to the depth of ten feet upon a placer claim, but all that is necessary is to make a discovery of mineral previous to location.

But the court refused to give to the jury the instructions aforesaid, so

prayed by the defendants or either thereof. And to the refusal of
47 the court to give to the jury the instructions aforesaid, and to the refusal of each of said instructions, the defendants then and there excepted.

And thereupon the court charged the jury orally that the defendants had not established such a title as should be satisfactory for the consideration of the jury, and directed the jury to return a verdict that there was no title to the ground in controversy in the defendants.

To which charge, and every part thereof, the said defendants then and there excepted.

And because these several matters do not appear by the record herein the said defendants bring this their bill of exceptions, and pray his honor, the district judge of said district, who at the said trial presided, to sign and seal the same, and make it part of the record herein, which is accordingly done.

(S'g'd) MOSES HALLETT, [SEAL.]
District Judge Presiding.

48 (Endorsed:) 663. Circuit court of the U. S., district of Colorado. Relief Jackson vs. John D. Roby et al. Def'ts' bill of exception. Filed Jan. 12, 1882. (S'g'd) Edward F. Bishop, clerk. A. D. Bullis and M. B. Carpenter, att'ys for def'ts.

And the said location certificate, referred to in the defendants' bill of exceptions, is in words and figures as follows, to wit:

Location certificate.—Exhibit A. (*Book W, page* 52.)

STATE OF COLORADO,
County of Summit, ss:

Know all men by these presents, that James D. Rankin and John D. Roby, of the county of Summit, State of Colorado, claim by right of discovery and location the Bartlett & Shock placer claim, containing 23.49 acres, situate in Spalding & Miners' mining district, county of
49 Summit, State of Colorado, bounded and described as follows, to wit: Beginning at a stake at corner No. 1, a pine post, whence cor. No. 9 mineral survey 843 bears N. 7° E. 337 ft.; thence west 496.1 ft. to cor. No. 2, a pine post; thence S. 27° 5′ west 235 ft. to cor. No. 3, a pine post; thence S. 56° 40′ W. 350 ft. to cor. No. 4, a pine post; thence S. 0° 23′ W. 288 ft. to cor. No. 5, a pine post; thence N. 79° 19′ E. 131.5 ft. to cor. No. 6, a pine post; thence S. 4° 12′ E. 618.5 ft. to cor. No. 7, a pine post, whence U. S. L. M. Autocrat bears S. 55° 55′ E.; thence east 734.6 ft. to cor. No. 8, a pine post; thence N. 10′ W. 227.3 ft. to cor. No. 9, a pine post; thence east 123 ft. to cor. No. 10, a pine post; thence north 145 ft. to cor. No. 11, a pine post; thence east 251.83 feet to cor. No. 12, a pine post, same as cor. No. 6, survey 843, whence mount'n peake No. 2 bears N. 47° 53′ W.; thence N. 10° W. 252.76 ft. to cor. No. 13,

a pine post; thence N. 89° 45 W. 384.5 ft. to cor. No. 14, a pine post; thence N. 7° E. 667.4 ft. to place of beginning.

Date of location, July 13th, A. D. 1880.

Date of certificate, Aug. 2d, A. D. 1880.

JAMES D. RANKIN. [SEAL.]
JOHN D. ROBY. [SEAL.]

Recorded at 7 o'clock a. m., Aug. 2d, A. D. 1880.

JNO. A. WILLOUGHBY,
Recorder.

50 STATE OF COLORADO,
County of Summit, ss:

I, Jno. A. Willoughby, county clerk and ex-officio recorder of deeds, etc., in and for the county and State aforesaid, do hereby certify that the foregoing is a true, full, correct, and complete transcript of record of above instrument, as the same appears of record in my office.

Witness my hand and official seal this 1st day of Nov., A. D. 1881.

{ SUMMIT COUNTY } (S'g'd) JNO. A. WILLOUGHBY,
{ SEAL, COLO. } *County Clerk & Recorder,*
By JNO. McNAMARA, *Deputy.*

(Endorsed:) 663. Location certificate. Bartlett & Shock placer claim.

STATE OF COLORADO,
County of Summit, ss:

OFFICE OF COUNTY CLERK AND RECORDER.

I hereby certify that the within instrument was filed in this office for record at o'clock . m. , A. D. 188 , and is duly recorded in book , page .

Recorder.

By

Deputy.

Fees $.

Filed Jan. 12, 1882. Edward F. Bishop, clerk. Def'ts' Exhibit A.

And afterwards, and on, to wit, the 17th day of August, A. D. 1882, came again the said plaintiff, by his attorney aforesaid, and filed
51 in said court and in said cause his bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States, and the said bond is in words and figures as follows, to wit:

Bond on writ of error.

THE UNITED STATES of AMERICA,
District of Colorado:

Know all men by these presents that I, Relief Jackson, of the city of La Fayett, and State of Indiana, as principal, and Jacob Snetzer, of Georgetown, Clear Creek Co., Colorado, as surety, are held and firmly bound unto John D. Roby and James D. Rankin, in the full and just sum of five hun-

dred dollars, to be paid to the said John D. Roby and James D. Rankin, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this day of August, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas, lately at the October term, A. D. 1881, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Relief Jackson, plaintiff, and John D. Roby and James D. Rankin, defendant, judgment was rendered against the said Relief Jackson, having *obtained a writ of error to reverse the said judgment of the said court, and a citation directed to the said John D. Roby and James D. Rankin, citing and admonishing them to be and appear at a term of the Supreme Court of the United States to be held at Washington on the ninth day of October next:

Now, the condition of the above obligation is such that, if the said Relief Jackson shall prosecute said writ of error to effect, and answer all costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) RELIEF JACKSON. [SEAL.]
JACOB SNETZER. [SEAL.]

Approved—
(S'g'd) MOSES HALLETT,
Dist. Judge.

Justification.

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Jacob Snetzer, surety on the within bond, being first duly sworn, deposes and saith that he is worth in real estate the sum below set opposite his name; that is to say, as to two thousand dollars over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

(S'g'd) JACOB SNETZER.

Subscribed and sworn to before me, at said district, this 15th day of August, A. D. 1882.

(S'g'd) L. H. SHEPAUL,
U. S. Cir. C't Commissioner in and for said District.

(Indorsed:) Gen. No. 663. Circuit court of the United States, district of Colorado. Relief Jackson vs. John D. Roby et al. Bond upon writ of error by plaintiff, $500. Filed this 17th day of Aug., A. D. 1882. (S'g'd) Edward F. Bishop, clerk, by Wm. E. Rogers, deputy clerk.

*Obtained a writ of error to reverse the judgment of the said court, or having proved and been allowed an appeal from said decree to the court of the United States.

52 And the said writ of error is hereto attached, to wit:

Writ of error to circuit court U. S.

UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, between Relief Jackson, plaintiff, and John D. Roby and James D. Rankin, defendants, a a manifest error hath happened, to the great damage of the said Relief Jackson, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the ninth day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of August, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 107th year.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Allowed by—

MOSES B. HALLETT,
Dist. Judge.

52½ *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court at Denver, in said district, this 20th day of September, A. D. 1882.

[SEAL.] EDWARD F. BISHOP, *Clerk,*
By , *Deputy Clerk.*

(Indorsed:) Gen. No. 663. Circuit court of the United States. Relief Jackson, plaintiff in error, vs. John D. Roby et al. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U.

S. this 17th day of August, A. D. 1882. Edward F. Bishop, clerk; by Wm. E. Rogers, deputy clerk. A. W. Brazee, attorney for plaintiff in error.

And the said citation is hereto attached, to wit:

53 *Citation U. S. court.*

THE UNITED STATES OF AMERICA,
District of Colorado:

The United States of America to John D. Roby and James D. Rankin, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, District of Columbia, on the ninth day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the district of Colorado, at Denver, wherein Relief Jackson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 17th day of August, in the year of our Lord one thousand eight hundred and eighty-two.

MOSES HALLETT, *Judge.*

54 *Proof of service.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

On this day of , A. D. 18 , personally appeared Josias Tippett before me, the subscriber, a commissioner of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to John D. Roby, at Summit County, in said district, on the 1st day of September, A. D. 1882, and delivered a true copy of the within citation to James D. Rankin, at Summit County, in said district, on the 5th day of September, A. D. 1882, and that he knows the persons so served to be the defendants in error mentioned in the said citation.

J. TIPPETT.

Sworn to and subscribed before me this 5th day of September, A. D. 1882.

ADAM L. SHOCK,
United States Circuit Court
Commissioner in and for said District.

(Indorsed:) Original. Gen. No. 663. Supreme Court of the United States. District of Colorado. Relief Jackson, plaintiff in error, vs. John D. Roby & James D. Rankin, defendant in error. Citation. Filed in circuit court of the U. S. this 9' day of Sept., A. D. 1882. Edward F.

Bishop, clerk; by , deputy clerk. John D. Pope, attorney for plaintiff in error, St. Louis, Missouri.

54½ And afterwards, and on, to wit, the 11th day of September, A. D. 1882, came again the said defendants, by their attorney aforesaid, and filed in said court and in said cause their bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States. And the said bond is in words and figures as follows, to wit:

Bond on writ of error.

55 THE UNITED STATES OF AMERICA,
District of Colorado:

Know all men by these presents that John D. Roby and James D. Rankin, as principals, and Thomas Boylan and L. B. Smart, as sureties, are held and firmly bound unto Relief Jackson in the full and just sum of two hundred & fifty dollars, to be paid to the said Relief Jackson; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this day of January, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the October term, A. D. 1881, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between Relief Jackson, plaintiff, and John D. Roby and James D. Rankin, defendants, judgment was rendered that neither party had established title to the ground in controversy, and the said John D. Roby and James D. Rankin having * obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Relief Jackson citing and admonishing him to be and appear at a term of the Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said James D. Rankin and John D. Roby shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) JOHN D. ROBY. [SEAL.]
" JAMES D. RANKIN. [SEAL.]
" THOMAS BOYLAN. [SEAL.]
" L. B. SMART. [SEAL.]

Approved Sept. 11, 1882.
(S'g'd) MOSES HALLETT, *Judge.*

56 *Justification.*

UNITED STATES OF AMERICA,
District of Colorado, County of Summit, ss:

Thomas Boylan and L. B. Smart, sureties on the within bond, being each first duly sworn, depose and saith that he is worth, in real estate,

* Obtained a writ of error to reverse the judgment of the said court, or having proved and been allowed an appeal from said decree to the Court of the United States.

the sum below set opposite his name, that is to say, as to Thomas Boylan, one thousand dollars, as to L. B. Smart, one thousand dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

(S'g'd) 1. THOMAS BOYLAN. [SEAL.]
" 2. L. B. SMART. [SEAL.]

Subscribed and sworn to before me, at Breckenridge, this 18th day of January, A. D. 1882.

[NOTARIAL SEAL.] (S'g'd) E. G. BARTLETT,
Notary Public.

(Indorsed:) Gen. No. 663. Circuit court of the United States, district of Colorado. John D Roby and James D. Rankin, plaintiffs in error, vs. Relief Jackson, d. Appeal bond. Defendants, $250. Filed in the circuit court, U. S. this 11' day of Septe., A. D. 1882. (S'g'd) Edward F. Bishop, clerk; by , deputy clerk.

And the said writ of error is hereto attached, to wit:

Writ of error.

57 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said circuit court between Relief Jackson and John D. Roby and James D. Rankin a manifest error hath happened, to the great damage of said John D. Roby and James D. Rankin, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this day September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 107 year.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Allowed by—

MOSES HALLETT, *Judge.*

58 *Return.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 20th day of September, A. D. 1882.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

By ,
Deputy Clerk.

(Indorsed:) Gen. No. 663. Supreme Court of the United States. John D. Roby and James D. Rankin, plaintiffs in error, vs. Relief Jackson. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 11 day of Sept'r, A. D. 1882. Edward F. Bishop, clerk; by , deputy clerk. M. B. Carpenter, attorney for plaintiffs in error.

And the said citation is hereto attached, to wit:

Citation.

59 Citation U. S. circuit court.

THE UNITED STATES OF AMERICA,
District of Colorado:

The United States of America to Relief Jackson, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, within & for said district of Colorado, wherein John D. Roby and James D. Rankin are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 11th day of September, in the year of our Lord one thousand eight hundred and eighty-two.

MOSES HALLETT, *Judge.*

60 *Proof of service.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

On this 13th day of September, A. D. 1882, personally appeared Mason B. Carpenter before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he deliv-

ered a true copy of the within citation to A. W. Brazee, attorney for Relief Jackson, the within-named defendant in error.

MASON B. CARPENTER.

Sworn to and subscribed before me this 13th day of September, A. D. 1882.

[SEAL.] EDWARD F. BISHOP,
Clerk Dist. Court U. S., Dist of Colorado,
By ,
Deputy Clerk.

(Indorsed:) Gen. No. 663. Orig'l. Supreme Court of the United States. John D. Roby and James D. Rankin, plaintiffs in error, vs. Relief Jackson, defendant in error. Citation. Filed in court of the U. S. this day of , A. D. 18 . , clerk, by , deputy clerk. M. B. Carpenter and A. Steck, attorney' for plaintiffs in error.

61 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein Relief Jackson was plaintiff and John D. Roby and James D. Rankin were defendants, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 20th day of September, A. D. 1882.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

62 *Plaintiff's assignment of error.*

Supreme Court of the United States.

RELIEF JACKSON, PLAINTIFF IN ERROR,
vs.
JOHN D. ROBY & JAMES D. RANKIN, DEFENDANT' IN ERROR.

Afterwards, to wit, on the first day of the October term, A. D. 1882, of the said Supreme Court, comes the said Relief Jackson, by John D. Pope, his attorney, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given against the said Relief Jackson, whereas by the law of the land the said judgment ought to have been given for

the said Relief Jackson and against the said John D. Roby and James D. Rankin for the recovery of the said land and premises.

There is also error in this, that the said judge, so holding said circuit court, refused to allow the said matters so produced and given in evidence on the part of the said Relief Jackson to be considered by the jury as claimed and insisted upon by his counsel.

There is also error in this, the opinion of the said judge declared and delivered to the jury, "that the several matters so produced
63 and given in evidence on the part of the said Relief Jackson as aforesaid, tending to prove the several facts aforesaid, were not sufficient, if believed by the jury to establish such facts, to prove any possession or right of possession in him, said Relief Jackson, to the premises in controversy, or to entitle him to a verdict in this cause."

There is also error in this, the further declared and delivered opinion of the said judge, "that the uses of the said Thomas Klak claim and of the land in controversy, under the circumstances, as aforesaid stated, did not give said Relief Jackson any possession or right of possession to the ground included in said Thomas Klak claim, nor to any part or parcel thereof."

There is also error in this, the opinion of the said judge, declared and delivered to the said jury, "that the several matters produced and given in evidence on the trial of said issues by the said parties, respectively, were not sufficient to entitle either of them to a verdict in this cause, and instructing the jury to so find," in so far as the last-mentioned opinion decides that the said plaintiff was not entitled to a verdict, and directing the jury to so find.

Wherefore the said Relief Jackson prays that the judgment aforesaid, for the errors aforesaid, may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he
64 hath lost by occasion of the said judgment, with his costs in this behalf laid out, expended, and incurred.

JOHN D. POPE,
Attorney for Plaintiff in Error.

(Indorsement on cover:) No. 1002. Relief Jackson, plaintiff in error, vs. John D. Roby and James D. Rankin. Colorado C. C. U. S. Filed 9th October, 1882.

109-440

OFFICE SUPREME COURT U.S.
FILED
APR. 11 1903
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

[No. 1002.]

RELIEF JACKSON, - - - *Plaintiff in Error*,

vs.

JOHN D. ROBY AND JAMES D. RANKIN,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR, AND REPLY TO DEFENDANTS' BRIEF.

JOHN D. POPE,
Attorney for Plaintiff in Error.

ST. LOUIS: PRINTED BY THE CENTRAL LAW JOURNAL.

the said Relief Jackson and against the said John D. Roby and James D. Rankin for the recovery of the said land and premises.

There is also error in this, that the said judge, so holding said circuit court, refused to allow the said matters so produced and given in evidence on the part of the said Relief Jackson to be considered by the jury as claimed and insisted upon by his counsel.

There is also error in this, the opinion of the said judge declared and delivered to the jury, "that the several matters so produced
63 and given in evidence on the part of the said Relief Jackson as aforesaid, tending to prove the several facts aforesaid, were not sufficient, if believed by the jury to establish such facts, to prove any possession or right of possession in him, said Relief Jackson, to the premises in controversy, or to entitle him to a verdict in this cause."

There is also error in this, the further declared and delivered opinion of the said judge, "that the uses of the said Thomas Klak claim and of the land in controversy, under the circumstances, as aforesaid stated, did not give said Relief Jackson any possession or right of possession to the ground included in said Thomas Klak claim, nor to any part or parcel thereof."

There is also error in this, the opinion of the said judge, declared and delivered to the said jury, "that the several matters produced and given in evidence on the trial of said issues by the said parties, respectively, were not sufficient to entitle either of them to a verdict in this cause, and instructing the jury to so find," in so far as the last-mentioned opinion decides that the said plaintiff was not entitled to a verdict, and directing the jury to so find.

Wherefore the said Relief Jackson prays that the judgment aforesaid, for the errors aforesaid, may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he
64 hath lost by occasion of the said judgment, with his costs in this behalf laid out, expended, and incurred.

JOHN D. POPE,
Attorney for Plaintiff in Error.

(Indorsement on cover:) No. 1002. Relief Jackson, plaintiff in error, vs. John D. Roby and James D. Rankin. Colorado C. C. U. S. Filed 9th October, 1882.

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OFFICE SUPREME COURT U.S.
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[No. 1002.]

RELIEF JACKSON, - - - *Plaintiff in Error*,

vs.

JOHN D. ROBY AND JAMES D. RANKIN,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR, AND REPLY TO DEFENDANTS' BRIEF.

JOHN D. POPE,
Attorney for Plaintiff in Error.

ST. LOUIS: PRINTED BY THE CENTRAL LAW JOURNAL.

STATEMENT OF CASE.

This is an action at law to recover certain lands, part of "Thomas Klak claim on Blue River," a placer mining claim on the public domain in Summit County, Colorado. It was brought in support of plaintiff's adverse claim against the application of defendants for patent of lands, in which was included the land in controversy. (folio, 2 to 6.) The answer denies the allegations of the complaint, and sets up a claim to the possession of the land in controversy by right of prior occupation. (f. 13.) The reply denies the alleged right of defendants. The trial was by jury.

The evidence for plaintiff tended to show the location of the ground in controversy, with other ground, in accordance with the rules and customs of miners, March 30, 1869 (f. 32 to 34), and that the locators, who were grantors of plaintiff, were owners of another claim next to and adjoining the premises in controversy, which they began to work in 1872, and they and plaintiff, as successive owners, continued to work on such adjoining claim, in each mining season, until and during the year 1880. In prosecuting said work the flume used by them was extended, and the tailings were deposited, over and upon the premises in controvery, a distance of 150 feet, so that, in the end, they extended over one-third part of the entire area of Klak claim, and on and over the ground claimed by defendants. It was necessary to thus use the premises in prosecuting the work on the consolidated claim. (f. 34, 35.) Plaintiff also showed a complete chain of title by deed to Klak claim, which, as before stated, included the land in controversy,

from the persons who made the location thereof, to himself; and also showed title to the next adjoining claim, which is known as "Lomax Gulch Claim." The deeds constituting his chain of title, had been duly recorded in the proper office before defendants entered. The mineral character of the land and entry of defendants into possession before the commencement of the action, were also shown. (f. 36.)

The defendants introduced evidence tending to prove the issues on their part.

The evidence introduced for plaintiff, his counsel insisted before the judge presiding at the trial, ought to be considered by the jury; but the judge held and decided that the evidence tending to prove such facts was not sufficient, if believed by the jury to establish such facts, to prove any possession or right of possession in the plaintiff to the premises in controversy, and plaintiff excepted. (f. 37.)

The judge further held and decided that the user of the Klak claim and of the portion thereof in controversy under the circumstances before stated, did not give the plaintiff any possession or right of possession to the ground included in said Klak claim nor to any part or parcel thereof; and plaintiff excepted. (f. 38.)

The judge further instructed the jury that the evidence was not sufficient to entitle either party to a verdict; and plaintiff excepted to so much of this instruction as was against him. (f. 36.)

The aforesaid decisions are assigned for error. (f. 62–3).

POINTS AND AUTHORITIES.

I.

When two or more adjoining mining claims are owned by the same person, he may do on any one claim the entire amount of annual work required by law to be done on all,

and it will be as effectual if so done as if each claim had received directly its appropriate amount. This is so by the express provision of the statute of Colorado (Session Laws 1879 p. 140, sec. 2), and this court has determined the same question in the same way independently of State legislation.

Smelter Co. v. Kemp, 104 U. S. 636–653.

Two or more adjoining claims held by the same owner, were spoken of as "a consolidated claim" in the case above cited, and it was said that "it would be absurb to require a shaft to be sunk on each location."

The Act of Congress of 1872 (R. S. 3224) provides that "where such claims are held in common, such expenditure may be made upon any one claim." In Smelting Co. v. Kemp, *supra*, this statute was treated as applicable to placer, as well as to lode, claims, and the propriety of so treating it is manifest from the fact that it is in this same section that the requirement is found for the expenditure of a certain sum annually on every mining claim. If this statute imposed the duty of making certain expenditures on placer claims, it also provided that when such claims were held in common, the entire expenditure might be made on any one claim, for all.

It is plain that the court below erred in ruling that work done on Lomax claim was not as effectual to preserve the right to the possession of the ground in dispute, as if it had been done on Klak claim, of which the disputed ground formed part.

II.

And the court committed a still more palpable error in holding that the evidence offered by plaintiff did not tend to show work done or improvements made directly on the Klak claim. The flume extended from Lomax claim, on

and over Klak, for a distance of 150 feet; the tailings deposited at the end of the flume covered one-third of Klak, including a portion of the ground in dispute. Although the dirt or gravel was taken from Lomax it was washed through the flume to the end on Klak, and the work of dumping the tailings was all done on Klak. When washing was suspended to "clean up," the gold was, of course, taken from the flume along its entire length. It is a mere truism to say that the construction of a flume on Klak claim, and the actual use of it in washing for gold, was an expenditure in improvements and labor upon that claim. It can make no difference that the gravel from which the gold was extracted came originally from Lomax. Nothing could be plainer than this.

III.

But this is not all. If it could be maintained that expenditures made on one of two claims held in common was not good as to both claims, and if it could also be maintained that expenditures actually made on Klak were, in legal contemplation, not done on Klak but on Lomax, still it could not be disputed that the acts done by plaintiff and his grantors on Klak claim amounted in law to a holding of possession of that claim, including all the land embraced within its boundaries. The claim began at a certain bridge on Blue River, and extended up the river to a point 1,000 feet above the bridge, and from hill to hill on either side. Here were distinct boundaries visible to the naked eye, and, moreover, the location certificate and deeds constituting plaintiff's chain of title being on record, all the world had notice of the claim and its boundaries. (Gen. Laws of Colo. (1877), p. 139, sec. 178). There was actual occupation of a large part of the claim by means of a flume constructed and used upon it, by work regularly done in washing for gold, and by the maintenance of a dump for the deposit of

tailings. These tailings contain more or less of gold, are frequently worked over, and, while it is true that if they are allowed to flow off, they are considered as abandoned, (Jones v. Jackson, 7 Cal. 237), yet, until they are abandoned, they are of themselves sufficient to constitute a mine. (Rogers v. Cooney, 7 Nevada, 213.)

It has been decided over and over again, that such acts done on such a claim amount to a holding of possession of the entire claim.

Rogers v. Cooney, *supra*.

Golden Fleece Co. v. Cable Con. Co., 12 Nevada, 312.

Jones v. Jackson, *supra*.

English v. Johnson, 17 Cal. 107, 118.

N. N. Mining Co. v. Orient Mining Co., 1 Fed. Rep. 524, 539.

IV.

And possession held under such circumstances is not only extended by construction so as to include all the ground in the entire claim, but it is presumed to be rightful and in conformity to law. And this possession affords *prima facie* evidence of title. If the precise nature of the title is not shown it is presumed to be in fee simple, and if it is shown to be less than a fee, then the possession is construed to be in harmony with, and subordinate to such lesser title.

Smith v. Lorrillard, 10 J. R. 356.

Sears v. Taylor, 4 Colo. 38.

Keane v. Cannorvan, 21 Cal. 305.

Richardson v. McNulty, 24 Ib, 339, 349.

Tyler on Ejectment, 70, 904.

Wright v. Mattison, 18 How. 50–58.

Prescott v. Nivers, 4 Mason, 330.

Lea v. Polk Co. Copper Co., 21 How. 493.

V.

It follows that such possession is of itself sufficient to maintain an action for the recovery of land; and so it has been expressly held, not only in ordinary actions of ejectment, but also in suits for the recovery of mining claims when the fee was in the government and the mere possessory right was in dispute. In English v. Johnson, *supra*, it was held: "Where plaintiff claims under purchase and location, a small tract of mineral land with demarked limits of which he is in possession and there is no proof on the trial that the extent of his claim is opposed to the local rules, the presumption is that the possession is rightful and not wrongful.

"In such case, the plaintiff need not show in the first instance, that he was in possession in accordance with the local laws; but may (as a vendee under a deed may as to other land) make a *prima facie* case upon possession; and this is enough until the defendant shows that the possession is wrongful because in violation of rules which justify him in going upon the premises and working them,"

In Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 199, it was held: "Possession of mining ground, acquired by an entry under a claim for mining purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied by actual occupancy of part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, although such acts of possession are not done in accordance with any local mining rule."

And to the same effect are as Campbell v. Rankin, 99 U. S. 261, and Mining Co. v. Taylor, 100 U. S. 37–42.

The judge in the court below took the case from the jury on the ground that expenditures made on Lomax claim were not a compliance with the law as to Klak which adjoined it

and was owned and worked in common with it—also on the ground that the work actually done and the improvements actually made on Klak claim were, in legal contemplation, done, not on Klak, but on Lomax—and also on the ground that actual possession of part of Klak claim with distinct metes and bounds, with location notice and chain of title duly recorded, did not make a *prima facie* case for plaintiff. There can be no doubt that the court was wrong on every point decided.

JOHN D. POPE,
Attorney for Plaintiff in Error.

REPLY TO BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

The first proposition submitted by opposing counsel is that there was no evidence offered by plaintiff relative to the amount of work performed on the two claims — Lomax Gulch and Klak. This is a mistake. There was such evidence, but it was not necessary or proper to encumber the record with the details of such work, as to amount, because there was no ruling made or exception taken in the court below that required evidence of amount of work to be before this court. Plaintiff's bill of exceptions distinctly shows (ff. 35 to 38) that the rulings of the court below, of which complaint is made here, pertained to three points: 1. Whether work done on Lomax Gulch answered in law for work on Klak, which adjoined and was worked in common with it. 2. Whether constructing a flume and maintaining a dump on Klak claim was an expenditure made upon it within the meaning of the law, and 3. Whether actual possession held since 1869 of part of the ground

which defendant attempted to appropriate in 1880—such possession being held, too, under recorded location certificate and recorded color of title, at least — was sufficient to show, *prima facie*, a right of recovery in plaintiff. Nothing was said in the rulings which the court made as to the amount of annual expenditures on the property, and under the well established rules of practice in this court, all evidence relating directly to the value of the work was omitted from the bill of exceptions.

But the record does show that the amount of work done was very large; the flume was extended 150 feet on Klak claim, and over one-third of its entire area was covered by the dump. With these facts before it, the court could not say the value of the work done was below the legal requirement.

And there are still other answers to this objection. It appears (f. 35) that work was continued "in each mining season until and during the year 1880." July 13, 1880, defendant attempted to relocate the ground in dispute. The court will take judicial notice that June, July and August constitute the placer mining season. If, therefore, there had been a law ever since 1869, requiring a certain amount of labor to be done annually on the claims, the continuance of work in 1879 would have cured all former deficiencies. (N. N. M. Co. v. O. M. Co., 6 Sawyer, 301; R. S. sec. 2324.) And, as work was continued during the mining season of 1880, there must have been a resumption of work in 1880 before defendants' location was perfected. After plaintiff had resumed work in 1880, he was entitled to the entire year to complete it. (Act of Congress, January 20, 1880, sec. 2.) And a location on his ground by another party during the year was illegal and void.

Belk v. Meagher, 104 U. S. 279.
Holland v. M. A. G. Q. M. Co. 53 Cal. 150–151.

Again: There was no issue as to the amount of work done, and it is held that a party desiring to take advantage

of the law which forfeits locations for failure to do the requisite amount of work, must raise the issue in his pleadings.

Movenhaut v. Wilson, 52 Cal. 263–268.

And the burden was on defendant to show affirmatively that the necessary work had not been done.

Oreamuno v. N. S. G. & S. M. Co., 1 Nev. 215.
English v. Johnson, 17 Cal. 107–118.

Counsel for defendants insist that as the work done on Lomax Gulch claim did not have for its object the extraction of gold from Klak claim, such work could not save a forfeiture of Klak. The Act of Congress provides (R. S. 2324) that "where such claims are held in common such expenditure may be made upon any one claim." The Colorado statute, which was enacted March 12, 1879, reads: "But where two or more claims lie contiguous and are owned by the same person, the expenditure hereby required for each claim may be made on any one claim."

Sessions Laws Colo. (1879), p. 40, sec. 2.

There is nothing in the Colorado statute about a general system of development, or about the work having direct reference to the development of each claim. The only conditions are that the claims shall adjoin each other and be owned by the same person — conditions which unquestionably existed in this case. Work had been done for 1879 under this law, and had at least been commenced under it for 1880, before defendants attempted to effect a location. This cured all former delinquencies, if any existed. But without reference to the statute of Colorado, it might be conceded, without danger to plaintiff's case, that where an expenditure is not made directly on a claim nor as part of a system for the working of adjoining claims, but is performed at a distant point, it must have reference to the development or working of the claim before it can

properly be considered as an expenditure upon it. That is not this case. Here the claims adjoined each other, were worked together and could not be worked in any other way. Klak was necessary to the working of Lomax. It was not simply *occupied* as a dumping ground; it was *located* as a placer mining claim, and was actually occupied by part of plaintiff's flume, as well as by his dump. The only thing to be said of this work, calling in question its character as representing Klak as well as Lomax, is that the gravel used in washing for gold was taken from Lomax. But when the same person owns two adjoining claims, and his flume extends across both, can it be necessary that gravel shall be taken from both to save a forfeiture? Are not adjoining claims so held, "held in common," within the meaning of the act of Congress, and are they not "worked as parts of "one general system," within the meaning of the authorities cited by defendants' counsel? If not, a great deal of expenditure which has been made in good faith is money thrown away, and many titles heretofore supposed to be good are worthless. What does the language "held in common" and "worked by one general system," mean? If it means that the gravel or ore must be taken from each claim it amounts to nothing, because taking gravel or ore from each claim would have satisfied the law as it stood without the provision as to claims held in common. No, the construction put upon this statute by miners is the only natural and sensible construction. The law should be so construed as to have some rational object; it should not be made a trap for the unwary, and should not be strained for the purpose of working the destruction of titles acquired in good faith. "Forfeitures have always been deemed in law odious, and courts have universally insisted upon the forfeiture being made clearly apparent before enforcing it."

Mt. D. M. & M. Co. v. Callison, 5 Sawyer, 457.

Failure to do annual labor does not, of itself, work a forfeiture. Before any forfeiture takes effect, it must be shown that some other person has entered and perfected a re-location, and the entry for that purpose, probably the entire work of perfecting the new location, must be done before the party holding under the prior location has resumed work.

Little Gunnell M. Co. v. Kimber, 1 Morrison's Mining Rep. 536–539.

Morenhaut v. Wilson, 52 Cal. 268.

A re-location consists of several acts, all of which must be done before it can be said that it has been accomplished; and it has been held, with good reason, that if work is resumed before the re-location is perfected, including the requisite work, the forfeiture is saved.

Graydon v. Hood, Morrison's Mining Rights, 4th Ed. 65.

Wade's American Mining Law, sec. 30.

There is another view to take of this matter of labor on Klak claim. Whether work on Lomax Gulch claim could be counted as work on Klak under the circumstances, is one question, and whether constructing a flume on Klak and doing work on it, was not work on Klak, even though the gravel was all taken from Lomax, is another and very different question. It has never been decided that no expenditure on a claim except actual mining for the precious metals could satisfy the law. Building a miner's cabin, constructing a tram-way, erecting a crusher or smelter or constructing a ditch or flume pertains to mining, and if done on a claim ought to be held to be an expenditure upon it within the meaning of the law. In this case, it does not affirmatively appear that the flume on Klak was not intended to wash gravel from Klak, as well as from Lomax, and the burden was on defendant, not only to plead but to prove,

that no purpose to wash gravel from Klak existed. Nothing ought to be presumed to effectuate a forfeiture.

It is to be remembered that this work was literally done on Klak claim whatever may have been its object. A learned court has held that when work was literally done on a claim, though it was in mining a lode which belonged to another claim, the law was satisfied as to the claim on which the work was done. Said the court; "When a miner does the necessary labor anywhere within his boundaries upon the surface or below it, the condition of the mining law as to labor has been complied with."

Mt. D. M. & M. Co. v. Callison, 5 Sawyer 456.

The concession made in defendants' brief that plaintiff might hold part of the Klak ground as a dump subject to their right to locate it as a placer claim, is respectfully declined. It was located for mining purposes, March 30th 1869. (f. 33). The location was made and recorded in accordance with the custom of miners. (f. 321). Plaintiff held under a complete chain of title duly recorded. (f. 36). There was actual possession held of part of the ground by a flume and a very large dump. This makes the case of a party in actual possession of ground to the extent of the entire claim. He was on the ground; his title was on record, and the law made the record notice to all the world. The location certificate and deeds under which plaintiff held constituted color of title.

Wright v. Mattison, 18 How. 50–58.

"Where a person enters into land under a claim of title thereto, by a recorded deed, his entry and possession are referred to such title; and he is deemed to have seizin of the land co-extensive with the boundaries stated in the deed, when there is no open adverse possession of any part of the land so described in any other person."

Prescott v. Nivers, 4 Mason, R. 330.

It is not necessary that the deed be on record.
Lea v. Polk Co. C. Co., 21 How. 493.

"The doctrine is well settled that, where a man enters on land claiming a right and title to the same under color of conveyance, and acquires a seizin by his entry, his seizin will extend to the whole parcel within the limits hereinbefore stated; for in this case, an entry on part, is an entry on the whole."
Tyler on Ejectment, 904.

"It is a maxim of the law that the party in possession of land is presumed to have a valid title thereto, and this presumption can be overcome only by proving title out of such party. Indeed, it has been said that possession of real estate is *prima facie* evidence of the highest estate in the property; that is, a seizin in fee."
Id. 70.

Actual possession of a mining claim is sufficient evidence of title to authorize a recovery against a mere trespasser.
Campbell v. Rankin, 99 U. S. 261.

It is plain that plaintiff made a good *prima facie* case for a recovery.

Defendants seek to break down the case made by plaintiff's evidence by objecting to the introduction of the location certificate of Klak claim.

The first ground of objection is that "no usage or custom or rule of miners concerning the size and location of placer claims has been shown, etc.," (f. 41.) There was proof that "it was the custom of miners to make locations of placer claims of the length of 200 feet up and down the stream, and from hill to hill, and to make a record thereof in the office of the county recorder," (f. 32.) The objection was,

therefore, unfounded as respects the facts of the case. But it was not necessary to show what the rules and customs of miners were. The legal presumption is that the location was made according to the rules and customs. A labored effort is made in defendants' brief to have a different rule of law declared for this case. A lengthy quotation is given from Hense v. Sullivan, 2 Colo. 424. But the facts of that case were different from the facts here. That was an attempt to recover on a mere paper title. There was no presumption in favor of the title, because it was not accompanied by possession. There is no presumption in favor of the title of a person, when some one else is in possession. The presumption is against him, *because it is in favor of the person who is in possession.* Therefore, the court held that: "Plaintiffs in ejectment, who seek to recover a mining claim upon the strength of their paper title, there being nothing to show that they or their grantors were ever in possession, must prove a valid location of their claim according to the rules, usages and customs of the district prevailing at the time such location was made.".

The subsequent case of Sears v. Taylor, 4 Colo. 38, is in point here. In that case the possession was coupled with the paper title. The presumptions were, therefore, in favor of the regularity and legality of the title. The court below had been requested to charge as follows: "The plaintiff in this case claims the property in the first count of the declaration, by virtue of the local laws and customs of Grass Valley and Ohio Mining Districts, and by occupation and purchase; and in order to recover on said count, he must show what the laws and customs of said districts were, and that he complied with the same." (f. 40). The request was refused, and the Supreme Court held the refusal right. On page 42, the court said: "The prior possession of the plaintiff being uncontradicted, a legal presumption arose that he had complied with all requirements of the *lex loci* peculiar

to that mining district necessary to the acquisition of the title upon which he had declared."

The decision in Sears v. Taylor, was unquestionably correct. See cases cited under fourth and fifth points of plaintiff's brief. It is needless to elaborate this proposition.

Defendants' next objection to the location certificate of Klak claim, is that it did not appear "that the boundaries had been staked or marked." (f. 41). It does not appear from the bill of exceptions, whether they were or were not staked or marked. Hence, the objection would have had no foundation if the law had been as supposed by defendants' counsel. But we have just seen that the presumption is that all needful things were done; that all rules had been complied with. It is hardly necessary to add that in making locations prior to May 10th, 1872, the law did not require the boundaries to be marked on the ground.

Gelchich v. Moriarty, 53 Cal. 217–220.
R. S., § 2324.

The next and last objection to the location certificate of Klak claim is, that there was not "a discovery of mineral shown." But it does not appear that there was not. It did appear that Klak claim was mineral land, "containing auriferous sand and gravel affording gold," (f. 36). When this was discovered does not appear, but if the law in force in 1869, required a discovery of gold before a location, it is to be presumed the law was complied with. Again, if it had not appeared that Klak was situated down the gulch below Lomax, and for that reason necessarily gold-bearing; and if there had not been independent proof, at the trial, that Klak contained auriferous sand and gravel affording gold, the dump itself, which plaintiff and his grantors had piled up on Klak, made a gold placer mine of it.

Rogers v. Cooney, 7 Nevada 213.

But, says defendants' counsel, the gravel on the dump was abandoned. The evidence shows no such thing. The sand and gravel were piled up on plaintiff's land, and cannot fairly be considered as abandoned. Plaintiff kept them on his own ground and still had them in possession. And if it could be presumed, to help defendants along, that no discovery of gold-bearing sand or gravel had been made before the location of Klak in 1869, and that such a discovery was necessary, they would still be in difficulty, because it is held that a discovery after the location and before a relocation by some one else, will save the location.

N. N. M. Co. v. O. M. Co., 6 Sawyer 300.

So that if we could suppose plaintiff and his grantors worked on gravel and sand containing gold for ten years without making a discovery of gold, although they were there conducting the business of placer mining, the dump itself, which must have been known to contain gold, satisfied the law as to discovery long before defendants conceived the idea of appropriating the ground.

Counsel for defendants contend that there is a legal presumption that there were written rules in force in Spalding mining district in 1869, when Klak was located, and cite King v. Edwards, 1 Mont. 236, and Campbell v. Rankin, 2 Id. 368. The authorities cited do not sustain the proposition. What they hold is, that when it is once shown that written rules have been in force, it will be presumed that they continue in force until proof is produced of a repeal or modification of them. But this is immaterial, because whatever the rules were, it is to be presumed they were complied with.

Counsel for defendants also contend that it was necessary for plaintiff to prove that the boundaries of Klak claim had been staked or marked, and cite Hess v. Winder, 30 Cal. 349. It has already been seen that, prior to May 10, 1872,

it was not required to mark off the boundaries on the ground. In Hess v. Winder, two judges dissented, but, accepting the decision of the majority as correct, the case for defendants is not inproved. The majority of the court held:

1. That where there is no paper title and no rules are shown to exist, the claim must appear to have been so marked off as to "fairly advertise all concerned, where and what it is, in other words, its extent;" (p. 35) and

2. "If a party relies on a constructive possession by deed he must show himself in actual possession of a part of the land described in it, and the description must be definite and certain as to the boundaries of the land. If the deed contains no definite and certain boundaries, which can be located, it cannot have the effect to extend the possession beyond the *possessio pedis*, which is definite, positive and notorious." The court added: "The deed in question does not contain a description which could aid to extend plaintiff's possession by construction" (p. 358). The descriptive part of the deed reads as follows: "All and singular that certain mining claim held, owned and possessed &c. * * bounded on the north by Manzanita claim, on the south by the Monte Christo claim." The east and west boundaries were not given . In the case at bar, the boundaries are as distinctly stated as can be. The claim begins at the centre of the bridge across Blue river, extends 1000 feet up the river and from hill to hill on either side. At that place the hills rise suddenly and abruptly from the made land which contains the gold bearing gravel and sand. At any rate, plaintiff is entitled to prove this to be so, if he can, unless it is held the description is sufficient without it. And it distinctly appears that this manner and form of location was according to the custom prevailing in Spalding Mining district in 1869. (f. 32).

The point is raised here, though it does not appear to have been raised in the court below, that neither plaintiff, nor those under whom he claims, were citizens of the United

States, or had declared their intention to become citizens. Plaintiff sued in the United States Circuit Court as a citizen of Indiana, and no objection was made on the score of citizenship. There is certainly no presumption against the citizenship of the locators of Klak claim or of the plaintiff in this suit.

If it affirmatively appeared that the locators of Klak claim were foreigners, plaintiff, after purchasing the claim from them, could hold it.

N. N. M. Co. v. O. M. Co., 6 Sawyer, 301.

As to plaintiff's citizenship it is sufficient to quote from a decision of this court: "The question of citizenship constitutes no part of the issue upon the merits; it must be raised by a plea to the jurisdiction."

De Wolf v. Robaud, 1 Peters, 476.

As to the refusal of instructions for defendant, plaintiff feels very little concern. His business in this court is to show that the trial court erred in its decisions as to the law on which he relied, and in taking the case from the jury. If plaintiff's title is good, it is wholly immaterial to him what the law is as to the customs prevailing in the mining district in 1880. But it is fair to the learned judge of the court below to say that in his view there was lacking some element of proof to make a good custom of the character needed to sustain defendants' location. It may be added that if a location of 23 49-100 acres is good for 20 acres and bad as to the 3 49-100 acres, it might be a difficult task to eliminate the 3 49-100, and establish the boundaries for the balance.

But all this is of little consequence, because plaintiff had a good title under the mining law, and defendants location was illegal and void.

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